Supreme Court, U.S.
FILED

931263 FEB 2 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

ERROL BERNARD,

Petitioner,

vs.

HARRY CONNICK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS NEW ORLEANS DISTRICT ATTORNEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY W. BIZAL
PIERCE & BIZAL
639 Loyola Avenue,
Suite 1620
New Orleans, Louisiana
70113
Telephone: (504) 525-1328

MACK E. BARHAM
ROBERT E. ARCENEAUX*
KATHY S. AUSTIN
BARHAM & ARCENEAUX
A Professional Law
Corporation
Poydras Center, Suite 2700
650 Poydras Street
New Orleans, Louisiana
70130
Telephone: (504) 525-4400

Counsel of Record*

Attorneys for Petitioner, Errol Bernard

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Was the right to exculpatory evidence articulated in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), sufficiently established in 1975 so as to result in a denial of a defense of qualified immunity to a district attorney in his *individual* capacity in a 42 U.S.C. § 1983 claim based upon failure to train or supervise his assistants?

II. Is proof of "deliberate indifference" to constitutional rights necessary to sustain a 42 U.S.C. § 1983 claim against a municipal official in his or her *individual* capacity for failure to train or supervise employees?

III. Is subjective proof of "deliberate indifference" to constitutional rights always required to sustain a 42 U.S.C. § 1983 claim against a municipal official for failure to train or supervise employees regarding a clearly established constitutional right which the employees are substantially certain to encounter and which, absent training and supervision, they are substantially certain to abridge?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

RELEVANT STATUTE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. The lower courts' holding that Connick is entitled to qualified immunity makes a mockery of the unqualified rights secured by this Court in *Brady v. Maryland*, and is in direct contravention of controlling precedents from this Court and decisions of the Second, Fifth, and Eighth Circuit Courts of Appeals 5

II. The lower courts' application of the "deliberate indifference" standard to petitioner's action against Connick in his individual capacity is in direct conflict with the holdings of this Court and numerous circuit court holdings 14

III. The lower courts' requirement that petitioner produce subjective evidence of Connick's "deliberate indifference" to his constitutional rights is contrary to this Court's holding in *City of Canton v. Harris* and the Second Circuit's holding in *Walker v. City of New York* 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 5, 6

Barber v. City of Salem, Ohio, 953 F.2d 232 (6th Cir. 1992) 27

Boddie v. City of Columbus, 989 F.2d 745 (5th Cir. 1993) 6, 13

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ..... *passim*

Brandon v. Holt, 469 U.S. 475, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) 16

Bruning v. Pixler, 949 F.2d 352 (10th Cir. 1991), *cert. denied, sub nom., Roberson v. Bruning*, ___ U.S. ___, 112 S.Ct. 1943, 118 L.Ed.2d 548 (1992) 6, 13

Cagle v. Gilley, 957 F.2d 1347 (6th Cir. 1992) 7

Calhoun v. Gaines, 982 F.2d 1470 (10th Cir. 1992) 6

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) 10, 12

Campbell v. Bowlin, 724 F.2d 484 (5th Cir. 1984) 18

Canfield v. School District No. 230, 991 F.2d 1316 (7th Cir. 1993) 26

City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) ..... *passim*

Clay v. Conlee, 815 F.2d 1164 (8th Cir. 1987) 22

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 20

Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991) 26

TABLE OF AUTHORITIES – Continued

Page

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) 9

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993) 7

Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988) 12

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) 9

Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992) 17

Gonzalez v. Ysletta Independent School District, 996 F.2d 745 (5th Cir. 1993) 12

Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987) 13

H.C. by Hewett v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) 19

Hafer v. Melo, ___ U.S. ___, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) 17

Hahn v. McLey, 737 F.2d 771 (8th Cir. 1984) 22

Hanson v. Black, 885 F.2d 642 (9th Cir. 1989) 20

Hardin v. Hayes, 957 F.2d 845 (11th Cir. 1992) 17, 19

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 5, 13, 14

Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1992), *cert. denied*, 459 U.S. 883, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982) 19

Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991) 18

Hinshaw v. Doofer, 785 F.2d 1260 (5th Cir. 1986) 22

TABLE OF AUTHORITIES – Continued

Page

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1943, 85 L.Ed.2d 142 (1985) 6, 7, 13, 26

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 26

Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) 16

Imbler v. Patchman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) 7

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) 17

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) 16

Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991) 18, 21

Leatherman v. Tarrant County Narcotics Unit, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) 15, 29

Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) 15

Low v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) 13

Lozano v. Smith, 718 F.2d 756 (5th Cir. 1983) 21

Marchant v. City of Little Rock, 741 F.2d 201 (8th Cir. 1984) 18

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) 6, 13

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992) 13

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 22

TABLE OF AUTHORITIES – Continued

Page

McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987), *cert. denied, sub nom., McIntosh v. Carlucci*, 487 U.S. 1217, 108 S.Ct. 2970, 101 L.Ed.2d 905 (1988) 12

Melear v. Spears, 862 F.2d 1177 (5th Cir. 1989) 13

Meriwether v. Coughlin, 879 F.2d 1037 (2d Cir. 1989) 20

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) 7

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 15, 16, 18, 19

Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) 8, 9, 11, 12

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) 10

O'Quinn v. Manuel, 773 F.2d 605 (5th Cir. 1985) 21

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 15

Owen v. City of Independence, 445 U.S. 655, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) 16, 23, 24

Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1339, 103 L.Ed.2d 809 (1989) 26

Pearl v. Dobbs, 649 F.2d 608 (8th Cir. 1981) 22

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 102 L.Ed.2d 281 (1988) 10

Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986) 19

Ritchie v. Wickstrom, 938 F.2d 689 (6th Cir. 1991) 18

TABLE OF AUTHORITIES – Continued

Page

Rollins v. Farmer, 731 F.2d 533 (8th Cir. 1984)..... 18

Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992)....18, 20

Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992), *cert. denied, sub nom., Appleby v. Sepulveda*, ___ U.S. ___, 114 S.Ct. 342, 126 L.Ed.2d 307 (1993).... 13

Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) 22

Smith v. Rowe, 761 F.2d 360 (7th Cir. 1985)..... 19

Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987)..... 15

St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)..... 15

State v. Gilmore, 323 So.2d 459 (La. 1975)..... 11

State v. Groves, 311 So.2d 230 (La. 1975)..... 11

State v. Johnson, 324 So.2d 349 (La. 1975)..... 11

State v. Melton, 296 So.2d 280 (La. 1974)..... 11

State v. Odom, 292 So.2d 189 (La. 1974)..... 11

State v. Pickett, 305 So.2d 509 (La. 1974)..... 11

State v. Thomas, 306 So.2d 696 (La. 1975)..... 11

State v. Woodruff, 281 So.2d 95 (La. 1973)..... 12

Tapia v. City of Greenwood, 965 F.2d 336 (7th Cir. 1992)..... 27

Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982)..... 6

United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)..... 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 10

United States v. Gonzalez, 491 F.2d 1202 (5th Cir. 1974) 10, 11

United States v. Kalfayan, 8 F.3d 1315 (9th Cir. 1993) 28

Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) 12, 24, 27, 28

White Plains Towing Co. v. Patterson, 991 F.2d 1049 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993) 7

Williams v. Dutton, 400 F.2d 797 (5th Cir. 1972) 10

Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984) 21, 22

Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056 (11th Cir. 1992) 13, 17

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331 and 1334 1

42 U.S.C. § 1983 ..... *passim*

OTHER

Under Color of Law, ABA J., Dec. 1992 28

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is found at 9 F.3d 103 (5th Cir. 1993).

The decision of the United States District Court for the Eastern District of Louisiana is not reported, and is found at 27a through 30a, *infra*.

JURISDICTIONAL STATEMENT

This case was filed in the United States District Court for the Eastern District of Louisiana pursuant to 42 U.S.C. § 1983. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1334. The decision of the United States Court of Appeals for the Fifth Circuit was rendered on November 4, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On April 18, 1975, Errol Bernard ("Bernard") was attacked on a New Orleans city street by Vernon Joseph, who had been released the previous day from the state penitentiary at Angola, Louisiana. A fist fight ensued and Bernard shot

and killed Joseph. When police officers Mike Marziale and Eddie Watson arrived to investigate the shooting, several bystanders described Bernard as the man who shot Joseph. Three witnesses were driven around the area in the police car until they identified Bernard walking along a nearby street and he was arrested. A weapon was taken from Bernard which was later proved to be the gun involved in the shooting.

On May 1, 1975, Bernard was indicted for second degree murder. An Application for Bill of Particulars was filed on his behalf, which asked if the District Attorney's Office had "knowledge of any statements, evidence, or any information of any nature that might be considered exculpatory in nature." Assistant District Attorneys Bridget Bane and David Jennings prepared an answer stating that "(t)he State has no such knowledge other than defendant's statements."

On October 10, 1975, a hearing was held on Bernard's Motion to Suppress Confession. At the time of the hearing, Bernard's file contained the police report, including Bernard's statement to the police that he acted in self-defense;[1] an eyewitness' signed statement in the police report indicating that a fight preceded the shooting; and statements of Vernon Joseph's family members reflecting his paranoid behavior, his rap sheet and the fact that he had been released from prison the day before he died. Significantly, the file also contained a ten page unofficial police report prepared by the investigating officers suggesting that "this case should be taken under advisement by the District Attorney's Office and that the arrested subject, Errol Bernard, should possibly be charged with manslaughter as he did act in self-defense, to a certain

---

[1] After his arrest, Bernard admitted to the arresting officers that he had shot Joseph but claimed that he had acted in self-defense. He told police that as he walked along Third Street, he noticed two men approaching him on the sidewalk. When they reached him, one man started a fight with Bernard and knocked him to the ground. Bernard then pulled a revolver from the rear of his waistband and shot Joseph in the chest. He had never seen Joseph before and did not know why he had attacked him.

extent in the shooting of Vernon Joseph." Despite the presence of this information in his file, the District Attorney's office did not supplement its response to Bernard's request for exculpatory evidence or forward any of this material to Bernard.

Bernard was tried for second degree murder on January 5-6, 1976. The jury returned a verdict of guilty as charged, and Bernard was sentenced to life imprisonment.

In November 1988, Bernard filed an application for post conviction relief on the grounds that the initial police report (which he had just obtained) contained exculpatory evidence to which he was entitled under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). On October 27, 1989, Judge Patrick Quinlin of the Criminal District Court for the Parish of Orleans set aside the conviction and vacated the sentence on the basis of the *Brady* evidence that had been withheld and ordered a new trial. Bernard entered an *Alford* plea of guilty to an amended charge of manslaughter. He was sentenced to twenty-one years, with credit for time already served, and was released.

Bernard brought the instant action on November 9, 1989, against Orleans Parish District Attorney Harry Connick ("Connick") and the various assistant district attorneys involved in his prosecution for violation of his civil rights under 42 U.S.C. § 1983. The defendants were sued in both their individual and official capacities. The action was predicated on allegations that the District Attorney neglected or refused to supervise, discipline or control the assistant district attorneys with callous disregard of the public's rights, which allegation encompasses the charge that the District Attorney failed to properly train his assistants.

On March 5, 1991, the defendants filed a Motion to Dismiss or Alternatively for Summary Judgment. A hearing was held on April 3, 1991, after which United States District Judge Peter Beer dismissed the claim against the defendants in their individual capacities based on absolute prosecutorial immunity. On April 8, 1991, Judge Beer issued a minute entry

granting the defendants' motion for summary judgment and dismissing the claims against them in their official capacities. *See* 2a, *infra*. Judge Beer reasoned that there was no genuine issue as to the existence of a policy of withholding exculpatory material. *See* 10a, *infra*. Although the court found that Bernard had demonstrated the existence of a genuine issue regarding the adequacy of the training program, it concluded that he failed to establish that this was the result of "deliberate indifference" by the District Attorney's Office, which it found was required by *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). *See* 12a-13a, *infra*. Finally, the Court found that the fact that thirteen Orleans Parish convictions had been overturned in fifteen years on the basis of *Brady* violations did not establish the existence of a municipal policy. *See* 14a, *infra*. Therefore, Judge Beer found that Bernard had not prevailed on any of the three theories by which a municipal policy may be proved as the basis of a § 1983 action.

Bernard appealed to the United States Court of Appeals for the Fifth Circuit. On January 31, 1992, the Fifth Circuit affirmed the decision of the district court dismissing the claims against the former Assistant District Attorneys individually and in their official capacities. However, the court reversed and remanded the district court ruling with respect to Connick's liability in his individual capacity. The Fifth Circuit determined that the district court had failed to consider whether the functions of a District Attorney as an administrator or investigative officer were protected by prosecutorial immunity. *See* 25a, *infra*. Because the alleged failure to train appeared not to fall within the District Attorney's role as a prosecutor, but instead within his capacity as administrator of his office, the Fifth Circuit concluded that the district court was incorrect in dismissing Connick in his individual capacity on the basis of absolute prosecutorial immunity. *See* 26a, *infra*.

After remand, Connick filed a Motion to Dismiss or Alternatively for Summary Judgment which was heard on

September 16, 1992. Judge Beer issued a minute entry granting the motion on October 6, 1992. The district court held that because the training of assistants fell outside of the prosecutor's quasi-judicial role, absolute immunity did not apply, but that such discretionary functions were shielded by qualified immunity. *See* 28a-29a, *infra*. The court concluded that when the incident occurred in 1975 and 1976 (some 12 years after this Court's holding in *Brady* was handed down) that "the *Brady* doctrine was not yet fully developed, and a reasonable prosecutor might well have been unaware of the boundaries of the defendant's right." *See* 29a, *infra*. Therefore, the court found that Connick was protected by qualified immunity. Additionally, the court reiterated its previous holding that Bernard was unable to demonstrate "deliberate indifference" by Connick to his constitutional rights, and was therefore unable to recover as a matter of law. *Id.*

The Fifth Circuit affirmed the District Court's ruling without written reasons on November 4, 1993. *See* 1a, *infra*.

REASONS FOR GRANTING THE WRIT

I. The lower courts' holding that Connick is entitled to qualified immunity makes a mockery of the unqualified rights secured by this Court in *Brady v. Maryland*, and is in direct contravention of controlling precedents from this Court and decisions of the Second, Fifth, and Eighth Circuit Courts of Appeals.

Public officials are shielded from liability for damages under § 1983 so long as their conduct has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). "If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald, supra*, 457 U.S.

at 818, 102 S.Ct. at 2738. The inquiry turns "primarily on objective factors." *Id.*[2]

A "particularized" principle of law need not have been expressed in order for a right to be well established.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, supra, 483 U.S. at 640, 107 S.Ct. at 3039. The question is not whether the law was settled, viewed abstractly, but whether, measured by an objective standard, a reasonable official would know that his action was illegal. *Boddie v. City of Columbus,* 989 F.2d 745, 748 (5th Cir. 1993).

Thus, it is not necessary to show that "the very action in question has previously been held unlawful." *Id.* "[T]here need not be a 'prior case precisely on all fours on the facts and law involved.' " *Marshall v. Allen,* 984 F.2d 787, 794 (7th Cir. 1993), quoting *Landstrom v. Illinois Department of Children & Family Services,* 892 F.2d 670, 676 (7th Cir. 1990). Officials are required to "know well developed legal principles and to relate and apply them to analogous factual situations." *Calhoun v. Gaines,* 982 F.2d 1470, 1475 (10th Cir. 1992).

---

[2] See also *Hobson v. Wilson,* 737 F.2d 1, 25 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1085, 105 S.Ct. 1943, 85 L.Ed.2d 142 (1985) ("*Harlow* redefined the qualified immunity defense to eliminate the subjective element."); *Trejo v. Perez,* 693 F.2d 482, 485 (5th Cir. 1982) (*Harlow* "delet[ed] the subjective component" in qualified immunity analysis). Thus, the defendant's intent is not relevant. *Bruning v. Pixler,* 949 F.2d 352, 356 (10th Cir. 1991), *cert. denied, sub nom., Roberson v. Bruning,* ___ U.S. ___, 112 S.Ct. 1943, 118 L.Ed.2d 548 (1992).

Where there is direct precedent from this Court, there can be little doubt as to whether a right is "clearly established." "Supreme Court precedent 'establishes' the law; to the extent that the Court's opinions give guidance we obviously do not doubt that the law is well-established." *Hobson v. Wilson, supra,* 737 F.2d at 26. *See also White Plains Towing Co. v. Patterson,* 991 F.2d 1049, 1064 (2d Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993) ("To determine whether a particular right was clearly established at the time defendants acted, a court should consider . . . (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question. . . . "); *Fortner v. Thomas,* 983 F.2d 1024, 1028 (11th Cir. 1993) ("[T]he existence of Supreme Court cases or cases in this circuit that recognize the alleged right is particularly important in determining whether the law is sufficiently clear to a reasonable official."); *Cagle v. Gilley,* 957 F.2d 1347, 1348 (6th Cir. 1992) (binding precedent from the Supreme Court supports the existence of a clearly established constitutional right). *See, e.g., Mitchell v. Forsyth,* 472 U.S. 511, 536, 105 S.Ct. 2806, 2820, 86 L.Ed.2d 411 (1985) (Supreme Court decision "laid to rest" the illegality of warrantless wiretapping in cases involving domestic threats to national security).

The lower courts avoided application of these well-established principles, and granted Connick qualified immunity[3] by finding that Bernard's right to exculpatory evidence was not "clearly established" at the time of his conviction:

> However, in 1975 and 1976, when this incident occurred, the *Brady* doctrine was not yet fully developed, and a reasonable prosecutor might well

---

[3] Absolute immunity under *Imbler v. Patchman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), is not due because it was conceded that "the training of assistants constitutes an administrative rather than a prosecutorial function," and therefore "fall[s] outside of the prosecutor's quasi-judicial role." 28a, *infra.*

> have been unaware of the boundaries of the defendant's right. Given the uncertainty surrounding *Brady* at the time of the alleged violation, the court finds that defendant is protected by qualified immunity in this case.

29a, *infra*.[4]

This holding makes a mockery of this Court's clear and unequivocal pronouncement in *Brady* in 1963 and its pre-1975 progeny:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 86, 83 S.Ct. at 1195-96. In 1972, this Court did not express any equivocation about its earlier holding. "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment." *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). That same year, this Court again affirmed *Brady*, this time explaining that its rule was of long-standing origin:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deception of a court and jurors by the presentation of known false evidence

---

[4] This holding is flatly contradicted by Connick's and his assistant's testimony that they were all well aware of *Brady*, and that they had a policy of attempting compliance, which they understood to require that they "turn over all exculpatory evidence." *See* 10a, *infra*, 24a, *infra*. However, the district court also found that the prosecutors' failure to recognize their obligation to turn over evidence in Bernard's case, and one prosecutor's statement that he did not "know what the heck [*Brady*] was back then and I'm not sure what it is now today," created a factual dispute as to the adequacy of their training. *See* 12a, *infra*.

> is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed.2d 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269, 79 S.Ct., at 1177. Thereafter, *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."

Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972). In 1974, conduct violative of *Brady* was described as "egregious conduct held . . . to amount to a denial of constitutional due process," as opposed to "ordinary trial error." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974).

Given these pronouncements, what "uncertainties" about *Brady*'s "boundaries" existed in 1975, as was found to be the case by the lower courts? 29a, *infra*. And, what "further developments" were necessary to inform the Louisiana court's eventual determination that the exculpatory evidence withheld from Bernard was subject to the *Brady* rule? If Bernard's case presented some unusual factual situation, one on *Brady*'s periphery, then the lower courts' holding might make some sense. However, the district attorneys' conduct here flew straight into the teeth of the *Brady* rule as it was originally expounded and repeatedly declared. *Moore v. Illinois, supra*, decided in 1972, explicitly defined the three different situations in which the withholding of exculpatory evidence could arise: when there is a knowing use of perjured testimony and a failure to disclose impeachment evidence; when there has been a specific request for defined exculpatory evidence that is refused; or when no specific request has been made but "obviously exculpatory" evidence is concealed. 427 U.S. at 103, 106, 112, 96 S.Ct. at 2397, 2399, 2402. Subsequent developments, such as *United States v. Agurs*, 427 U.S. 97, 96

S.Ct. 2392, 49 L.Ed.2d 342 (1976), and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which fleshed out the contours of *Brady*'s materiality requirement, or *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), which tackled the question of whether *Brady* required that the prosecution preserve exculpatory evidence, are not relevant here. Instead, the "well-settled" basic premise of *Brady*, that "the government has an obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment," *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 107 S.Ct. 989, 1001, 102 L.Ed.2d 281 (1988), was more than sufficient to put any reasonable district attorney on notice of the specific constitutional right involved, and his or her subordinates' violation of that right in Bernard's case, rights that were "unquestionably protected by the Due Process Clause." *Murray v. Carrier*, 477 U.S. 478, 499, 106 S.Ct. 2639, 2651, 91 L.Ed.2d 397 (1986) (Stevens, J., concurring). In the face of a specific request for any and all exculpatory evidence of any nature, Connick withheld evidence supporting a theory of defense. *See* 3a, *infra*.[5]

If guidance from this Court was insufficient to demonstrate to Connick the abject unconstitutionality of his office's actions, he also had the benefit of the Fifth Circuit's explanations of *Brady*. "The Supreme Court in *Brady* plainly proscribed governmental suppression of evidence that exculpated the defendant." *United States v. Gonzalez*, 491 F.2d 1202, 1208 (5th Cir. 1974). *See also Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1972) (*Brady* "imposed an affirmative duty on the prosecution to provide at the appropriate time

---

[5] This evidence included a police report stating that Bernard himself claimed self-defense, an eyewitness statement that a scuffle preceded the incident, statements from the victim's family attesting to his erratic behavior, the victim's prior criminal history and recent release from prison, and an unofficial police report stating that Bernard had acted in self-defense "to a certain extent." *See* 3a, *infra*.

requested evidence which is materially favorable to the accused as direct or impeaching evidence."). Additionally, the Fifth Circuit had noted in 1974 that *Brady* was expounded upon by *Moore v. Illinois, supra,* which "clearly articulated three criteria for measuring when the *Brady* rule has been violated as follows: (a) suppression by the prosecution after a request by the defendant, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *United States v. Gonzalez, supra,* 491 F.2d at 1208.

Moreover, Connick could not have been reasonably unaware of the Louisiana Supreme Court's jurisprudence on the subject. Prior to 1976, *Brady* was considered by the Louisiana Supreme Court 38 times, and the court never had any difficulty interpreting its clear and unequivocal mandate. As was stated in *State v. Melton,* 296 So.2d 280, 282 (La. 1974), "[i]t is clearly the law that the prosecution may not suppress evidence favorable to the accused without violating his constitutional right to due process." *See also State v. Gilmore,* 323 So.2d 459, 464 (La. 1975) ("*Brady* mandates that evidence favorable to the accused may not be suppressed by the prosecution after the accused has requested same."); *State v. Johnson,* 324 So.2d 349, 351 (La. 1975) ("*Brady v. Maryland, supra,* requires the prosecution to disclose evidence that is favorable to the accused."); *State v. Groves,* 311 So.2d 230, 235 (La. 1975) (*Brady* held that "the requirements of due process prohibit the prosecution from withholding favorable evidence from an accused that would tend to exculpate him or reduce punishment."); *State v. Thomas,* 306 So.2d 696, 697 (La. 1975) (*Brady* "held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."); *State v. Pickett,* 305 So.2d 509, 512 (La. 1974), citing *Brady v. Maryland, supra* (Failure to disclose exculpatory evidence "would subject the prosecution to a charge that it suppressed evidence favorable to an accused."); *State v. Odom,* 292 So.2d 189, 190 (La. 1974) (*Brady* held

"that an accused is denied due process if, after request, he is denied access to evidence favorable to him and material to guilt."). Indeed, in *State v. Woodruff*, 281 So.2d 95, 97 (La. 1973), the Louisiana high court held that it was "clear" that *Moore v. Illinois, supra,* and *Brady v. Maryland, supra,* required the prosecution to divulge evidence probative of the possibility of a claim of self-defense.

Not only is the lower courts' grant of qualified immunity to Connick impossible to reconcile with this Court's holdings regarding the limitations on the scope of such immunity and the plain meaning of *Brady,* as applied to the facts of this case, it is also contrary to the holdings of other circuit courts that have considered claims of qualified immunity in cases where *Brady* violations are alleged in § 1983 actions. Indeed, the Fifth Circuit itself found in an earlier case that *Brady* announced a "clearly established" right beyond the scope of immunity. *See Geter v. Fortenberry,* 849 F.2d 1550, 1559 (5th Cir. 1988) ("We agree with Geter that a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means or deliberately conceals exculpatory evidence, for such activity violates clearly established constitutional principles.") The same result was reached in *McIntosh v. Weinberger,* 810 F.2d 1411, 1434 (8th Cir. 1987), *cert. denied, sub nom., McIntosh v. Carlucci,* 487 U.S. 1217, 108 S.Ct. 2970, 101 L.Ed.2d 905 (1988) where the court denied qualified immunity because it thought "it clear that the destruction of evidence supporting the plaintiff's EEO claims and not obtainable elsewhere was fundamentally inconsistent with due process, *cf. Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 2528, 81 L.Ed.2d 413 (1963); *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), and that this too would have been clear to a reasonable person." Likewise, inherent in the court's holding in *Walker v. City of New York,* 974 F.2d 293 (2d Cir. 1992), that the plaintiff had proved "deliberate indifference" to his *Brady* rights by his prosecutor was a holding that "clearly established" rights were at issue. *See Gonzalez v. Ysletta Independent School District,* 996 F.2d

745, 759, 760 (5th Cir. 1993) (citations omitted) ("[P]olicy makers cannot be said to be deliberately indifferent to constitutional rights that were not clearly established at the time they acted. . . . ".)[6]

The lower courts' grant of qualified immunity in this case does serious violence to the policy that underscores the limitation of immunity announced in *Harlow v. Fitzgerald, supra*:

---

[6] In addition, the lower courts' holding is contrary to numerous cases that have denied qualified immunity in cases involving rights far more uncertain than the due process right at issue in *Brady*. *See, e.g., Boddie v. City of Columbus*, 989 F.2d 745, 749 (5th Cir. 1993) (First Amendment right of employee to associate with union was clearly established); *Marshall v. Allen*, 984 F.2d 787, 795 (7th Cir. 1993), and *Martinez v. City of Opa-Locka*, 971 F.2d 708, 713 (11th Cir. 1992) (public employee's right to speak out on issues of public concern without fear of firing was clearly established); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992), *cert. denied sub nom., Appleby v. Sepulveda*, ___ U.S. ___ 114 S.Ct. 342, 126 L.Ed.2d 307 (1993) (right to bodily privacy was clearly established, and corrections officer's ordering of parolee of opposite sex to collect urine sample in full view was a clear and established violation of that right); *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992) (prohibition against racially discriminatory hiring practices was clearly established); *Bruning v. Pixler, supra*, 949 F.2d at 347 (the knowing or reckless making of a false statement in an affidavit in support of a warrant is a clear violation of well established rules); *Melear v. Spears*, 862 F.2d 1177, 1185 (5th Cir. 1989) (fact that broad free-floating suspicion that suspect was inside building was insufficient to establish probable cause justifying warrantless search was clearly established); *Low v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir. 1985) (prohibition against sexually discriminatory hiring practices was clearly established); *Grandstaff v. City of Borger*, 767 F.2d 161, 168 (5th Cir. 1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987) (reckless use of deadly force in violation of clearly established law); *Hobson v. Wilson, supra*, 737 F.2d at 29 (right to be free of government action, taken with intent to disrupt or destroy lawful organizations, or to deter membership therein, was clearly established).

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. When an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

457 U.S. at 819, 102 S.Ct. at 2739. The lower courts' almost cavalier refusal to follow precedent sends quite the opposite message. It proclaims that prosecutors may withhold exculpatory evidence with impunity, and that innocent victims must simply grin and bear it.

II. The lower courts' application of the "deliberate indifference" standard to petitioner's action against Connick in his individual capacity is in direct conflict with the holdings of this Court and numerous circuit court holdings.

The lower courts held that Bernard's claim against Connick in his individual capacity could not survive summary judgment because Bernard failed to raise a question of fact as to whether Connick was "deliberately indifferent" to Bernard's constitutional rights sufficient to withstand summary judgment. Relying on *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the lower courts held that Bernard had failed "as a matter of law" to controvert Connick's subjective declaration that he was not "deliberately indifferent" to Bernard's rights, and that Bernard's claim was therefore due to be dismissed.

This holding fails to recognize the well-established distinction between claims against municipal officials in their *individual* capacities and municipal officials in their *official* capacities, the latter of which is nothing more than a direct claim against the employing municipality. This distinction has been recognized by this Court, and numerous circuit courts

applying this Court's precedents, including the Fifth Circuit itself.

This Court in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held that a municipality could constitute a "person" under § 1983, and could therefore be liable for violation of constitutional rights, provided that the municipality *itself* caused the constitutional abridgment at issue. *Respondeat superior* or vicarious liability could not be asserted as a basis for liability. *Id.*, at 694, 695, 98 S.Ct. at 2037-38. "It is only when 'the execution of the government's policy or custom- . . . inflicts the injury' that the municipality may be held liable under § 1983." *Springfield v. Kibbe*, 480 U.S. 257, 267, 107 S.Ct. 114, 119, 94 L.Ed.2d 293 (1987) (O'Connor, J., dissenting) (quoting *Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037-38). *See also Leatherman v. Tarrant County Narcotics Unit*, ___ U.S. ___, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993). After a difficult struggle with application of the *Monell* standard in cases that left the Court "deeply divided" on the question, in *City of Canton v. Harris, supra*, 489 U.S. at 385, 109 S.Ct. at 1203,[7] this Court definitively resolved the appropriate standard for liability to be applied in cases of municipal liability premised upon a failure to train subordinates that results in a violation of constitutional rights. In *City of Canton v. Harris, supra*, this Court held that the degree of fault which must be proved for municipal liability to attach under § 1983 in failure to train cases is one of "deliberate indifference." "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388, 109 S.Ct. at 1204.

---

[7] *See, e.g., St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Springfield v. Kibbe, supra; Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

Integral to this Court's holding in *City of Canton* was the fact that the cause of action asserted was one for *municipal* liability. This Court expressly found that the "deliberate indifference" standard of fault was required in order to avoid municipalities being held responsible by "*de facto respondeat superior*," a result that was rejected in *Monell*. 489 U.S. at 392; 109 S.Ct. at 1206. Concerns about the federal courts' "second-guessing" municipal employee training programs, which raises federalism concerns, also prompted this Court's adoption of the "deliberate indifference" standard. *Id.*

When a § 1983 claim is filed against a municipal officer in his *individual* capacity, the concerns that prompted *City of Canton*'s holding are not applicable, since recovery is not sought against the municipality. Thus, this Court has expressly castigated a circuit court for failing to "distinguish between suits against governments' officials 'in their individual capacities' on the one hand, and those in which 'only liability of the municipality itself was at issue,' on the other." *Brandon v. Holt*, 469 U.S. 475, 472-73, 105 S.Ct. 873, 878, 83 L.Ed.2d 878 (1985). *See also Owen v. City of Independence*, 445 U.S. 655, 653 n.37, 100 S.Ct. 1398, 1416, 63 L.Ed.2d 673 (1980), citing *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), and *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) ("On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental rather than personal liability is threatened"). This Court has further stated on at least two occasions that the standard for liability in individual capacity suits is entirely different than that imposed on actions against municipalities or against officials in their official capacities:

> On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). More is required in an official-capacity action,

> however, for a government entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting *Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Monell, supra; Oklahoma City v. Tuttle*, 471 U.S. 808, 817-818, 195 S.Ct. 2427, 2433, 85 L.Ed.2d 781 (1985); id., at 827, 828, 105 S.Ct. at 2437, 2438 (Brennan, J., concurring in judgment).

Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). *See also Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 361, 116 L.Ed.2d 301 (1991).

In accord with these admonitions, various circuit courts have recognized the well-established distinction between § 1983 actions filed against municipal employees in their *individual* as opposed to *official* capacities. *See Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 73 (2d Cir. 1992); *Yeldell v. Cooper Green Hospital, Inc., supra*, 956 F.2d at 1060; *Hardin v. Straub*, 954 F.2d 1193, 1198-99 (6th Cir. 1992). Among the consequences of this distinction is the standard of liability at issue. In a § 1983 action against Chief of Police Daryl Gates in his *individual* capacity, the Ninth Circuit correctly observed that while official liability must be "attributable to official policy or custom," such is not the case with individual capacity liability:

> The distinction between Gates' individual and official capacity liabilities, the proof of which oftentimes overlaps, is made more subtle by the supervisory role that he occupies. A supervisor will rarely be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury. Yet, this does not prevent a supervisor from being held liable in his individual capacity. Like the officers, Gates' individual liability hinges upon his participation in

> the deprivation of constitutional rights. But unlike the officers' involvement, which ordinarily is direct and personal, his participation may involve the setting in motion of acts which cause others to inflict constitutional injury. *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir. 1991). *See also Ritchie v. Wickstrom*, 938 F.2d 689, 691 (6th Cir. 1991); *Hill v Shelander*, 924 F.2d 1370, 1372 (7th Cir. 1991). The reason for this differentiation is clear. "[W]hen a suit is brought against an official in his or her individual capacity it is not necessary to prove a city-wide policy." *Marchant v. City of Little Rock*, 741 F.2d 201, 204 (8th Cir. 1984), *citing Rollins v. Farmer*, 731 F.2d 533, 535 (8th Cir. 1984). Since "city policy" is not the linchpin of liability, *Monell's* and its progeny's, including *Canton*'s, standard for liability is not applicable.

That the *Monell* "custom or policy" requirement, or the *Canton* "deliberate indifference" standard, is simply inapplicable to actions against officials in their *individual* capacities has not escaped the Fifth Circuit's attention on previous occasions. In *Campbell v. Bowlin*, 724 F.2d 484, 489 (5th Cir. 1984), that court noted that suits against officials in their official capacities require proof of constitutional violations resulting from official policy or custom; suits against officials in their individual capacities only require proof that the official, while discharging his or her official duty, acted to violate constitutional rights and that he or she knew or should have known, measured by an objective reasonableness standard, that his or her actions would have that effect. Moreover, in the case *sub judice* the Fifth Circuit implicitly recognized the distinction when, on the first appeal, it affirmed dismissal of Bernard's claims against Connick in his *official* capacity because of Bernard's failure to meet the "deliberate indifference" standard, but remanded the claim against Connick in his *individual* capacity. *See* 26a, *infra*. If "deliberate indifference" was required in either case, there would have been no cause to remand the latter. *See also Salas v. Carpenter*, 980

F.2d 299, 310 (5th Cir. 1992), refusing to apply *City of Canton, supra,* to a claim that did not involve municipal liability.

Thus, it is not surprising that "deliberate indifference" has not been the litmus test of liability in claims made against municipal officials in their *individual* capacities, even for causes of action grounded upon supervisor liability. That individual liability cannot be imposed on the basis of *respondeat superior, Monell, supra,* 436 U.S. at 690-91, 98 S.Ct. at 2036, and that "personal responsibility" must be established is clear; the appropriate standard for liability, however, is not. The circuits appear to be unanimous in holding that personal responsibility can exist even in the absence of direct participation. But, varying tests have evolved as to when personal responsibility exists. The Seventh Circuit holds that "[a]n official satisfies the personal responsibility requirement of § 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Smith v. Rowe,* 761 F.2d 360 (7th Cir. 1985). *See also Rascon v. Hardiman,* 803 F.2d 269, 274 (7th Cir. 1986). The Sixth Circuit's formulation is that the official must have either "encouraged the specific incident or misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays v. Jefferson County,* 668 F.2d 869, 874 (6th Cir. 1992), *cert. denied,* 459 U.S. 883, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982). In the Eleventh Circuit, "[a] supervisor may be liable under Section 1983 if he or she participates directly in acts constituting a constitutional violation, or if the challenged actions are causally connected to the constitutional violation." *Hardin v. Hayes,* 957 F.2d 845, 849 (11th Cir. 1992); *H.C. by Hewett v. Jarrard,* 786 F.2d 1080, 1086-87 (11th Cir. 1986). The Second Circuit appears to require "gross

negligence." *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989).[8]

The Ninth Circuit appears to have the most developed body of precedents in this area. A supervisor may be found liable for constitutional deprivations by a subordinate if the supervisor is personally involved in the deprivation or if there exists "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hanson v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). Such a causal connection exists where the supervisory official "implement[s] a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is the 'moving force of the constitutional violation.' " *Id.* Additionally,

> [s]upervisory liability is imposed against a supervisory official in his individual capacity for his "**own culpable action or inaction in the training, supervision, or control of his subordinates,**" *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987); for his "acquiesce(nce) in the constitutional deprivations of which (the) complaint is made," *Meade v.*

---

[8] Bernard argued to the Court of Appeals that "gross negligence" was the applicable standard, relying upon Second Circuit precedent. However, the proper standard of care to be applied is not before this Court at this time. This Court need only recognize that the "deliberate indifference" standard is not controlling. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 334 n.3, 106 S.Ct. 662, 666 n.3, 88 L.Ed.2d 662 (1986), where this Court, in holding that more than mere negligence was required to support a § 1983 claim for breach of the liberty interest secured by the Due Process Clause of the Fourteenth Amendment, noted that the question of "whether something less than intentional conduct, such as reckless or 'gross negligence,' is enough to trigger the protections of the Due Process Clause" was not before it. *See Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir. 1992), for the Fifth Circuit rule ("[U]nintentional conduct more culpable than negligence may deny due process," where that conduct amounts to an abuse of governmental authority.).

> *Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) (citation omitted); or for conduct that showed a "reckless or callous indifference to the rights of others." *Bordanaro*, 871 F.2d at 1163.

Larez v. City of Los Angeles, supra, 946 F.2d at 646 (emphasis added). *See also Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681 (9th Cir. 1984), holding that supervisory liability may be imposed for failure to train.[9]

The Ninth Circuit's holding that a failure to adequately train subordinates can constitute the basis of a claim for *individual* liability against a municipal supervisor is certainly not unique.

> The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color law of a federally secured right. The Supreme Court noted the causal requirement in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). . . . Other post-*Rizzo* cases have recognized that the section 1983 language "subjects, or causes to be subjected," is broader than direct personal involvement; it includes failure to perform a duty if that failure causes deprivation of protected rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976).
>
> This Court has held a cause of action under § 1983 was stated in a complaint that alleged a chief

---

[9] The Fifth Circuit appears to have adopted similar rules. To be liable under § 1983, a supervisory official must be either personally involved in the acts causing the deprivation of a person's constitutional rights, or there must be a causal connection between an act of the official and the constitutional violation sought to be addressed. *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983). Supervisors may face liability under § 1983 where they breach duties imposed by state or local laws, and as a result thereof, the complained of constitutional tort occurs. *See O'Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir. 1985), and numerous cases cited therein.

> of police was liable because his failure to establish proper procedures or adequately train or supervise personnel led to the deprivation of a prisoner's constitutional rights. *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974). Other circuits have also recognized a cause of action for a superior officer's negligence in training or supervising. *E.g., Burton v. Waller*, 502 F.2d 1261, 1285 (5th Cir. 1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1356, 43 L.Ed.2d 442 (1975); *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

McClelland v. Facteau, 610 F.2d 693, 695-96 (10th Cir. 1979). *See also Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987); *Hinshaw v. Doofer*, 785 F.2d 1260, 1263 (5th Cir. 1986); *Hahn v. McLey*, 737 F.2d 771, 773 (8th Cir. 1984); *Pearl v. Dobbs*, 649 F.2d 608, 609 (8th Cir. 1981); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976).

The lower courts' application of the *City of Canton* "deliberate indifference" standard, applicable to failure to train claims brought against either municipalities or municipal officials in their *official* capacities, to the instant failure to train claim brought against Connick in his *individual* capacity is directly contrary to the wealth of jurisprudence discussed above. In particular, the decision appears irreconcilable with *Ybarra v. Reno Thunder Mobile Home Village, supra*, where the court held that a claim against a district attorney in his individual capacity could be stated for failure to train his subordinates to refrain from destroying exculpatory evidence. 723 F.2d at 680.[10] In none of the cases discussed above, including *Ybarra*, did the court impose the "deliberate indifference" standard embraced by the lower court herein, nor did

---

[10] The *Ybarra* court ultimately found that, while the claim could be stated, the plaintiff failed to produce sufficient evidence to support it. 723 F.2d at 681.

they require that the defendant's conduct constitute the "custom or policy" of the municipality, which is the condition the "deliberate indifference" standard was designed to fulfill.

The lower courts' total abandonment of precedent could be more easily understood if this action was necessary in order to protect Connick and others similarly situated from frivolous claims, or if it somehow furthered the delicate balance which this Court has struck in interpreting § 1983 against the competing interests of the citizenry in protection from abridgment of their constitutional rights, municipal officials in freedom to exercise the functions of their office, and the public in protection of the public fisc. However, it does not. This equilibrium was explained in *Owen v. City of Independence, supra,* where this Court held that "qualified immunity" could not be asserted by a municipality as a defense to § 1983 liability.

> We believe that today's decision, together with prior precedents in this area, properly allocates [the cost of official misconduct] among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation, the officer whose conduct caused the injury; and the public, as presented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. New York City Dept. of Social Services,* 436 U.S., at 694, 98 S.Ct. at 2038.

445 U.S. at 658-59, 100 S.Ct. at 1419. The lower courts' decision destroys this symmetry for no good reason. Connick does not need the benefit of the "deliberate indifference" standard in order to be protected from undeserved liability. His protection is found in the "qualified immunity" that he is entitled to assert, as well as in the requirement that Bernard prove Connick's "personal participation" (fault and causation) in order to establish liability. If these defenses do not avail to Connick, then he is not entitled to the great protection afforded him by the lower courts. The effect of giving Connick the benefit of the "deliberate indifference" standard is to deprive the innocent victim who has been injured by an abuse of governmental authority (which abuse is already established by Connick's failure to qualify for qualified immunity) of his right to compensation. In short, the lower courts tilted the balance in Connick's favor, upsetting the policy equilibrium carefully struck by this Court for § 1983 actions, in direct contravention of controlling precedents.

III. The lower courts' requirement that petitioner produce subjective evidence of Connick's "deliberate indifference" to his constitutional rights is contrary to this Court's holding in *City of Canton v. Harris* and the Second Circuit's holding in *Walker v. City of New York.*

Assuming that "deliberate indifference" is the correct standard to be applied to Bernard's claim against Connick in his individual capacity, an examination of the lower courts' holding that this standard was not met reveals that a purely subjective test was applied. In its first treatment of this issue dismissing Bernard's claim against the defendants, it noted that the defendants had produced evidence that all of Connick's assistants were graduates of accredited law schools and were members of the bar, and that *Brady* was "an important concern to the office."

> This evidence remains uncontroverted except by plaintiff's bear (sic) allegations, for plaintiff has

> adduced no evidence even suggesting that the *Brady* rule was a matter of deliberate indifference to the District Attorney's Office. Mere allegations to the effect that the potential for constitutional violations is "self evident," does not meet plaintiff's burden of adducing some evidence that the training policy demonstrated deliberate indifference to constitutional rights.

12a, *infra*. The Fifth Circuit affirmed the dismissal of the claims against the defendants in their official capacities, merely noting that "a review of the record reveals that the district court was correct in finding that no genuine issue of material fact existed on this issue." 22a, *infra*. It stated that Bernard did not produce any evidence of "deliberate indifference," but rather "merely relied upon his allegations." *Id.* On remand, when faced with Bernard's claim against Connick in his individual capacity, the district court again found a lack of proof of "deliberate indifference" for the reasons "discussed in the court's original minute entry on this issue." 29a, *infra*. This holding was affirmed without opinion. *See* 1a, *infra*.

However, this Court made clear in *City of Canton v. Harris, supra*, that a subjective proof of deliberate intention is not always required, and that there are cases where, due to the nature of the right involved and the significant potential for or high probability of its abridgement, deliberate indifference may be self-evident.

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

489 U.S. at 339-90, 109 S.Ct. at 1205. *See also Id.*, at 397, 109 S.Ct. at 1209 (J. O'Connor, concurring) (The need for training may be established through evidence that a municipality failed to train its employees concerning a clear constitutional duty implicated in recurrent situations.) This Court offered as an example the need for police officers to arrest fleeing felons, where the need to train officers in the constitutional limitations on the use of deadly force is " 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.*, at 390 n.10, 109 S.Ct. at 1205 n.10.

Circuit courts applying *City of Canton v. Harris* have recognized that proof of the subjective "deliberate indifference" required by the lower courts here is not always required. "[L]iability may be imposed on a municipality upon a showing of deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided there is a causal connection between such inadequacies and the risk of harm to others." *Parker v. District of Columbia*, 850 F.2d 708, 713 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1339, 103 L.Ed.2d 809 (1989). "Deliberate indifference" is shown from evidence that a municipality "fail[ed] to train its employees with respect to a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Canfield v. School District No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993). Thus, municipalities have been found deliberately indifferent without any subjective proof whatsoever. *See, e.g., Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991) (failure to train constituted "deliberate indifference" where the Sheriff's Department devised a "field training program" which was never implemented instead of sending deputies to state training academy); *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (a city and its chief of police might be held liable for improper training, even if the defendant police officer were exonerated, since they put an officer on the street

who was so badly trained and instructed that he let his baton be taken away from him and then had to kill an unarmed civilian to save his own life); *Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir. 1992); *Barber v. City of Salem, Ohio*, 953 F.2d 232, 236 (6th Cir. 1992).

City of Canton v. Harris's objective test was applied by the Second Circuit to a claim against a municipality for its district attorney's violation of the plaintiff's *Brady* rights in *Walker v. City of New York, supra*. The court carefully analyzed *City of Canton*, and concluded that "deliberate indifference" could be demonstrated without subjective proof of intent when three conditions were met.

> First, the plaintiff must show that a policymaker knows "to a moral certainty" that her employees will confront a given situation. . . . Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. . . . A choice might also be difficult where, although the proper course is clear, the employee has powerful incentives to make the wrong choice. Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's rights.

974 F.2d at 297-98. Applying this test to the facts, the court concluded that "deliberate indifference" was demonstrated by the mere lack of any formal *Brady* training:

> First, the district attorney knows to a moral certainty that ADA's will acquire *Brady* material. Second, contrary to the district court, we do not think that in 1971, just seven years after *Brady* was decided, that the *Brady* standard was so obvious or easy to apply as to require, as a matter of law, no training or supervision. Indeed, the evidence withheld in this case, though clearly *Brady* material, was not the sort that one would obviously turn over, absent some knowledge of *Brady*. . . . Finally,

> withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights.

974 F.2d at 300.

Walker's compelling logic is hard to dispute, which is perhaps why the lower courts completely ignored the case even though it was cited to them. District Attorneys know beyond the shadow of any doubt that their prosecutors will encounter *Brady* material on an almost daily basis, and they must know that failure to divulge this material destroys the accused's constitutional rights. They should also be aware of the high probability of abuse. Indeed, one of Connick's own assistants admitted that he did not "know what the heck [*Brady*] was back then" and was not sure "what it is now today." 12a, *infra*. Aside from the possible lack of knowledge of the "intricacies" of *Brady* addressed by the Second Circuit, there is the temptation for abuse which necessarily results from any system that encourages zealous advocacy, which also increases the need for some express instruction regarding *Brady*, and perhaps some measure of discipline for its flagrant violation. To this must be added the fact that prosecutors are armed with immense power by a vocal public demanding convictions, further triggering an obligation to ensure that all so armed are aware of its limitations. Commenting on the plight of the *Walker* plaintiff, Professor Stephen Gillers noted the great danger in "[un]trained lawyers weilding [sic] public power." *Under Color of Law*, ABA J., Dec. 1992, at 121. The Ninth Circuit Court of Appeal expressly stated that it "shared [Professor Gillers'] concern" in *United States v. Kalfayan*, 8 F.3d 1315, 1324 (9th Cir. 1993).

The lower courts' holding that subjective proof of "deliberate indifference" was required by Bernard in order to survive summary judgment is impossible to reconcile with this Court's express statements in *City of Canton v. Harris, supra*, and with the Second Circuit's careful and considered application of those statements in *Walker v. City of New York, supra*, as well as the cases from other circuits which have recognized

that subjective proof of deliberate indifference is not always required. Under the facts of this case, assuming that Bernard had to demonstrate "deliberate indifference" in order to recover against Connick in his individual capacity, Bernard made a more than sufficient showing.

CONCLUSION

This case is one more example of the Fifth Circuit's apparent hostility toward § 1983 actions. Most recently, this Court had to rebuke that circuit by striking down the "heightened pleading" requirement that it was imposing in § 1983 cases. *See Leatherman v. Tarrant County Narcotics Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). In this case, while the Fifth Circuit recognized that Bernard's claim against Connick in his individual capacity could not be swept under the same rug as his claims against the defendants in their official capacities, it did so only begrudgingly. It expressly stated that its remand order was issued "reluctantly," and invited the district court to "find a defense of qualified immunity available," 26a, *infra*, bait which, not surprisingly, the district court took with relish. In the process, the district court committed gross and flagrant errors, paying only lip service to the precedents of this Court and ignoring precedents directly on point from other circuits. The Fifth Circuit has affirmed here without even issuing an opinion. Writs must be granted in this case to protect victims from the abuse of governmental power, violative of their Constitutional

rights, and to remind the courts that legitimate § 1983 actions cannot be sabotaged by courts without legal reason.[11]

Respectfully submitted,

GARY W. BIZAL
PIERCE & BIZAL
639 Loyola Avenue,
Suite 1620
New Orleans, Louisiana
70113
Telephone: (504) 525-1328

MACK E. BARHAM
ROBERT E. ARCENEAUX*
KATHY S. AUSTIN
BARHAM & ARCENEAUX
A Professional Law
Corporation
Poydras Center, Suite 2700
650 Poydras Street
New Orleans, Louisiana
70130
Telephone: (504) 525-4400

Counsel of Record*

Attorneys for Petitioner, Errol Bernard

---

[11] While Bernard certainly welcomes a full grant of certiorari and the opportunity to present his case to this Court, it may well be that a peremptory grant, with instructions to the Fifth Circuit to reconsider in light of controlling precedents, may be sufficient to fulfill this Court's supervisory role.

Filed: 11/04/93
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9502

ERROL BERNARD,

Plaintiff-Appellant,

versus

HARRY CONNICK, Individually and in his official capacity as New Orleans District Attorney,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 89 CV 4916)

Before CUNNINGHAM, DAVIS and JONES, Circuit Judges.

PER CURIUM:

AFFIRMED. See Local Rule 47.6.

Filed: 04/08/91
Date of Entry: 04/09/91
Loretta G. Whyte, Clerk

MINUTE ENTRY
BEER, J.
April 8, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ERROL BERNARD	CIVIL ACTION
VERSUS	NO. 89-4916
HARRY CONNICK, ET AL	SECTION M

This matter came before the Court for hearing on April 3, 1991 on the motions of defendants, Connick, Bane, Lenfant, Julien and Jennings, to dismiss or alternatively for summary judgment. After a consideration of the briefs submitted and the argument of counsel, this Court dismissed the claims against the defendant prosecuting attorneys in their individual capacities based on the prosecutors absolute immunity. *Imbler v. Pachtman*, 96 S.Ct. 984 (1976). The Court took under consideration the motions to dismiss or for summary judgment on the claims against the defendants in their official capacities. After a consideration of all of the arguments and after a review of the applicable law, it is the opinion of this Court that the motions should be granted.

Factual Background.

On April 18, 1975 plaintiff shot and killed Vernon Joseph in New Orleans, Louisiana. After several eye witnesses identified plaintiff as the man who shot Joseph he

was arrested. A weapon, later proved to be the weapon used to shoot Joseph, was found on plaintiff's person, and following the reading of his rights, plaintiff admitted that he had shot Joseph. Plaintiff told police that he had been attacked by Joseph, and that he had pulled out his revolver and shot Joseph. He could give no reason for the attack and claimed that he had never met Joseph before.

On May 1, 1975 plaintiff was indicted for second degree murder. An Application for Bill of Particulars was filed on behalf of plaintiff, specifically requesting production of "any statements, evidence, or any information of any nature that might be considered exculpatory in nature." An answer to the Bill of Particulars was prepared by defendants, Bridget Bane and David Jennings, which stated that the State had no such evidence other than defendant's statements. The district attorney's files eventually contained the police report in which plaintiff claimed self defense; the signed statement of eyewitnesses Theodore Hunter, that he had seen a "scuffle" during the course of which the victim was pushed to the ground and shot; the statements of the victim's family reflecting his recent paranoid behavior, his prior criminal history, and the fact that he had been released from prison the day before the shooting; and an unofficial police report in which two police detectives concluded that the plaintiff had acted in self-defense "to a certain extent." The District Attorney's Office never supplement[ed] the previous response to the plaintiff's request for exculpatory statements and materials.

On January 5 and 6, 1976 plaintiff was tried for second degree murder. The State of Louisiana was represented by defendants Bridget Bane, John Lenfant, IV, and

Henry P. Julien, Jr. Plaintiff was convicted and sentenced to life imprisonment.

In November of 1988, an application for post conviction relief was filed on behalf of plaintiff on the basis of information contained in the initial police report, a copy of which plaintiff first received on November 8, 1988. Plaintiff asserted that the report contained certain exculpatory information to which he was entitled under *Brady v. Maryland*, 83 S.Ct. 1194 (1963). On October 27, 1989, Hon. Patrick Quinlan of the Criminal District Court for the Parish of Orleans vacated the sentence imposed upon Mr. Bernard and ordered that he be afforded a new trial. On December 15, 1989, plaintiff entered an *Alford* plea of guilty to the amended charge of manslaughter. A sentence of twenty-one years was imposed, with credit for time served, the plaintiff has since been released.

On November 9, 1989, plaintiff brought this action under 42 U.S.C. § 1983 against District Attorney Harry Connick, former Assistant District Attorneys Bridget Bane, John Lenfant, IV, Henry P. Julien, Jr., and David Jennings,[1] as well as certain of the police officers involved in his arrest, in which he alleges that the defendants deprived him of his constitutional right to have exculpatory material made available to him under *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

On March 5, 1991, the defendant prosecuting attorneys filed this Motion to Dismiss or Alternatively for Summary Judgment.

---

[1] Defendant Jennings was added as a defendant on October 17, 1990.

LAW AND ANALYSIS

I. The Standard of Review.

This matter comes before the Court on Defendants Motions for Summary Judgment.[2] Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The rule "mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact.]" *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). The pleadings, depositions, admissions, and answers to interrogatories together with affidavits, must demonstrate that no genuine issue of material fact remains. *Id.* All the facts must be reviewed drawing all inferences most favorable to the party opposing the motion. *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990).

When, as here, the movant is the defendant, the movant initially need only make a " 'showing' – that is, pointing out to the District Court – that there is no absence of evidence to support the nonmoving party's case" *Celotex*, 106 S.Ct at 1554. However, a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the

---

[2] Defendants' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) are also technically before the Court, but since matters outside the pleadings have been presented and considered by the Court, the motions shall be treated as motions for summary judgment.

record. *Id.* at 2553. If the defendant makes such a "showing" the plaintiff may oppose the motion with any of the kinds of evidence listed in Rule 56(c), and although the plaintiff need not produce admissible evidence, the plaintiff must go beyond the pleadings to designate specific disputed facts. *Id.* The plaintiff must "do more than simply show that there is metaphysical doubt as to the material facts." *Matsushital Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986). If the plaintiff fails to do so the court must grant summary judgment, but if the plaintiff does make the requisite showing, the court then must decide if the defendant has demonstrated the absence of a genuine issue of material fact by a preponderance of the evidence. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

II. The Law of § 1983

The only aspect of this case still before this Court is the claims against the prosecuting attorneys in their official capacities. Suits against state and local officials in their official capacities are essentially suits against the government entity. *Kentucky v. Graham*, 105 S.Ct. 3099, 3105 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Therefore, the suit filed herein against the prosecuting attorneys in their official capacities is to be treated in all respects as a suit against the

Office of the District Attorney in and for the Parish of Orleans, State of Louisiana.[3]

It is well settled that liability may not be imposed upon a local government entity solely on a theory of respondeat superior. *Monell v. Dept. of Social Services*, 98 S.Ct. 2018 (1978). In *Monell* the Supreme Court reasoned that

> . . . a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 2083. Thus, the issue in this case is whether "there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." *Canton v. Harris*, 109 S.Ct. 1197 (1989). This Court must, therefore, first determine if there was indeed an unconstitutional government policy or custom.

After a review of the extensive analysis in recent Supreme Court jurisprudence as to what qualifies as municipal policy, see e.g., *Canton, supra; St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988); *Springfield v. Kibbe*, 107 S.Ct.

---

[3] Defendants contend that the Office of the District Attorney is a branch of the State of Louisiana, and that this suit is in essence a suit against the state for money damages, and is therefore barred under the Eleventh Amendment. This same defense was, however, rejected by the United States Court of Appeals for the Fifth Circuit in *Mairena v. Foti*, 816 F.2d 1061 (5th Cir. 1987).

1114 (1987); *Los Angeles v. Heller*, 106 S.Ct. 1571 (1986); *Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985), it is apparent that a plaintiff can demonstrate the existence of a "policy" for the purposes of a § 1983 action in three separate ways. To prove the existence of a "policy" the plaintiff must prove either the existence of an official policy which is itself unconstitutional, *Monell, supra;* or an official policy, which although neutral upon its face, demonstrates a deliberate choice to result in a deprivation to the plaintiff of his constitutional rights, *Canton, supra;* or a widespread "custom or usage" of depriving persons of their constitutional rights, *Adickes v. Kress & Co.*, 90 S.Ct. 1598 (1970). Plaintiff has put forward claims alleging the existence of a government policy under each of the theories listed above, and each claim will be analyzed separately.

1. The existence of an unconstitutional policy.

The law has been clear since *Monell, supra*, that "Local governing bodies, therefore, can be sued directly under § 1983, for monetary, declaratory, or injunctive relief where, as here, the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."

Initially it should be noted that it is not clear whether plaintiff specifically alleges in his complaint that it was the official policy of the Orleans Parish District Attorney to withhold *Brady* material. Plaintiff's complaint, in addition to alleging individual and conspiratorial action by the defendant prosecutors, alleges that it was the policy of District Attorney Harry Connick "to neglect or refuse

to supervise, discipline or in any way control defendants, assistant district attorneys,. . . . " Such language while clearly stating a "failure to train claim," discussed *infra*, does not allege a policy which is itself unconstitutional. However, in Answers to Interrogatories, No. 4, plaintiff alleges that:

> Harry Connick directed and instructed all of his Assistant District Attorneys in all cases to withhold exculpatory information contained in police reports. Additionally,. . . . Harry Connick advised all of his Assistant District Attorneys not to provide any defendants including the plaintiff with any copies of any police reports unless ordered to by a court regardless of their content . . .

Furthermore in his memorandum in opposition to this motion, plaintiff alleges that he pled that defendant Connick established "a policy or custom of withholding evidence to which a criminal defendant would be entitled under *Brady v. Maryland*." For the purposes of this motion, the Court will presume that the plaintiff's complaint adequately pleads a policy within the Orleans Parish District Attorney's Office of withholding exculpatory evidence.

Harry Connick was the District Attorney for Orleans Parish at the time at issue, and it is not disputed that he had the authority to make policy for the Orleans Parish District Attorney's Office at that time. Therefore, if the plaintiff could present credible evidence that it was Connick's policy to withhold material then plaintiff would be entitled to proceed to trial on that theory. *See, Mairena v. Foti*, 816 F.2d 1061 (5th Cir. 1987) (upholding jury award

that defendant district attorney had established challenged policy). But plaintiff has presented no evidence whatsoever of any such policy. Defendants have presented the deposition testimony of Connick and the sworn affidavits of Bridget Bane and David Jennings all attesting to the fact that it was the policy of the District Attorney's Office to turn over all exculpatory material in compliance with *Brady*. Plaintiff has not countered such testimony with any evidence whatsoever. There is no genuine issue as to the existence of a policy of withholding evidence and summary judgment for the defendant on any such claim is appropriate.

2. The existence of a neutral policy deliberately resulting in a deprivation of constitutional rights – the failure to train claim.

In *Canton v. Harris, supra,* the Supreme Court clearly set out the requirements for imposing liability on a local government entity for inadequate training of its employees. The Court held that "the inadequacy of [employee] training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204. The Court specifically rejected the use of a "negligence" or even "gross negligence" standard, and consistent with its prior case law held that only where a failure to train "reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id.* The Court reasoned:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in lights of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 1205. This standard requires more than a showing of inadequate training or even grossly inadequate training, it requires proof that the District Attorney consciously instituted a policy which would obviously result in constitutional violations. The Court noted that " '[M]unicipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives' by city policy makers." *Id.* at 1205 (quoting *Pembaur v. Cincinnati,* 106 S.Ct. 1292, 1300 (1986)). Such a standard imposes a heavy burden on § 1983 plaintiffs.

There is no doubt that plaintiff has alleged that the Orleans Parish District Attorney's Office had a policy of inadequate training and supervision in "reckless disregard" of his constitutional rights. As evidence of that claim the plaintiff cites the deposition testimony of defendants to the effect that no formal *Brady* training was given the assistants. Plaintiff also submits that the defendants' lack of knowledge of *Brady,* demonstrated by their

failure to recognize the evidence in this case as exculpatory, is also evidence of the lack of adequate training. Plaintiff also submits the deposition of defendant Lenfant in which he states: "I don't know what the heck [*Brady*] was back then and I'm not sure what it is now today." Although in support of the motions for summary judgment the defendants submit evidence as to the adequacy of the training, it is the opinion of this Court that the plaintiff has demonstrated the existence of a genuine issue as to the adequacy of the training programs.

But under the standard announced in *Canton, supra,* the plaintiff must do more than demonstrate the existence of an issue as to the adequacy of the training program. To survive a motion for summary judgment, the plaintiff must present evidence demonstrating that the inadequate training was the result of deliberate indifference by the District Attorney's Office. Defendants present evidence that all of the defendants had graduated from accredited law school, and all had passed the Louisiana State Bar Exam. Plaintiff also submits the deposition testimony of defendants Bane and Connick to the effect that *Brady* was an important concern to the office. This evidence remains uncontroverted except by plaintiff's bear [sic] allegations, for plaintiff has adduced no evidence even suggesting that the *Brady* rule was a matter of deliberate indifference to the District Attorney's Office. Mere allegations to the effect that the potential for constitutional violations is "self evident," does not meet plaintiffs burden of adducing some evidence that the training policy demonstrated deliberate indifference to constitutional rights.

Although plaintiff does not specifically make the argument, it could be argued that the prior incidents of

failures by Assistant District Attorneys to turn over *Brady* material made the need for further training obvious. As the Court noted in *Canton*, "It could also be that the [employees] . . . so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are 'deliberately indifferent' to the need." *Id.* at 1205 n. 10. Plaintiff submits as evidence of such past violations thirteen cases over the past fifteen years in which the courts have found that prosecutors in the District Attorney's Office have withheld evidence in violation of *Brady*. However, defendant correctly points out that thirteen such violations over a fifteen year period represent a truly insignificant number of violations. Plaintiff argues that these case[s] represent only the discovered violations, and only the reported cases, and that criminal defendants are denied *Brady* material as a matter of course. However, plaintiff has produced no evidence of any other violations, and this Court cannot conclude on the basis of these thirteen cases that "the need for further training must have been plainly obvious" to the District Attorney's Office. *Id.* at 1205 n. 10.

Plaintiff has simply produced no evidence tending to establish that the alleged inadequate training was the result of a "policy." The Supreme Court was clear in *Canton* that the plaintiff cannot meet his burden of proof, "by merely alleging that the existing training program for a class of employees, . . . represents a policy for which the city is responsible." *Id.* at 1205. That is all plaintiff has done in this case. There is no genuine issue as to the existence of a policy of inadequate training and summary judgment on the issue is therefore appropriate.

3. The existence of a Custom of Withholding *Brady* Material.[4]

The law is clear that a municipality may be held liable for the unconstitutional acts of its employees if the plaintiff can prove that the employee's acts were taken pursuant to "a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *Praprotnik*, 108 S.Ct. at 926 (quoting *Adickes v. S.H. Kress & Co.*, 90 S.Ct. 1598 (1970)). The custom must, however, be so widespread that it can be said to represent municipal policy. *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986); *Bennett v. Slidell*, 735 F.2d 861 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985).

Although plaintiff has alleged that at the time of his prosecution there was a custom in the Orleans Parish District Attorney's Office of withholding *Brady* material, plaintiff has failed to produce any evidence other than the thirteen cases to substantiate his claim that there was such a policy. Proof of the existence of thirteen cases of such misconduct over a fifteen year period is wholly inadequate to show the existence of custom so well settle[d] that it can be said to constitute municipal policy. The evidence indicates that incidence of misconduct were

---

[4] As the Supreme Court noted in *Canton*, such a claim of custom is any (sic) many respects nothing more than a restatement of a failure to train claim. 109 S.Ct. at 1203 n. 5. For the purposes of this motion this Court will nevertheless treat this as a separate theory of recovery.

rare, and that it was not the custom of the District Attorney's Office to withhold evidence. Plaintiff has failed to make a showing of any genuine issue as to the existence of such a custom and summary judgment on this issue is therefore appropriate.

It is the opinion of this Court that defendants have met their burden of demonstrating that there was no unconstitutional policy or custom of withholding *Brady* material in the Office of the District Attorney for the Parish of Orleans. Under existing law the plaintiff cannot prevail on his claim, and summary judgment is appropriate.

Counsel for mover is requested to submit a judgment consistent with this opinion.

Signed this 8th day of April, 1991.

/s/ Peter Beer
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3444
Summary Calendar

ERROL BERNARD,

Plaintiff-Appellant,

v.

HARRY CONNICK, ET AL.,

Defendant-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-4916-M-2)
(January 31, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges,[1]

EDITH H. JONES, Circuit Judge:

Appellant Errol Bernard contests the district court's dismissal and summary judgement for the defendants, New Orleans District Attorney Harry Connick and four

---

[1] Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

former Assistant D.A.'s, after Bernard sued them for *Brady* violations. We agree that most of the district court's reasoning, affirm its judgment, in part, but vacate and remand in part.

BACKGROUND

In 1975, Bernard shot and killed Vernon Joseph in New Orleans. Bernard was convicted of second degree murder and sentenced to life imprisonment. In 1988, Bernard was granted a new trial on grounds that the state failed to disclose a police report that contained exculpatory information to which he was entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Bernard entered an *Alford* guilty plea to an amended charge of manslaughter, was sentenced to 21 years with credit for time served, and has since been released.

Bernard filed a § 1983 action against Orleans Parish District Attorney Harry Connick and four former Assistant District Attorneys in their individual and official capacities for violating his *Brady* rights.[2]

Upon defendants' motion, the district court dismissed Bernard's claim against the defendants in their individual capacities on the basis of absolute prosecutorial immunity. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The court dismissed Bernard's claim against defendants in their official capacities because it found that a genuine issue of material fact

---

[2] Various police officers originally joined as defendants were voluntarily dismissed.

did not exist on the issue whether the Orleans Parish District Attorney's Office had a policy or custom of withholding *Brady* material. Bernard filed a timely notice of appeal.

DISCUSSION

A. Dismissal of Assistant District Attorneys in their individual capacities.

Bernard argues that the Assistant District Attorneys should not have been dismissed in their individual capacities on the basis of prosecutorial immunity because they acted deliberately and in concert with each other and conspired to deprive him of his right to exculpatory materials. He argues that their actions were outside the scope of their employment as prosecutors, and so they are not entitled to absolute immunity.

The law on this issue clearly forecloses Bernard's claim. *Imbler* held that a prosecutor has absolute immunity from civil liability for actions that are connected with the judicial phase of the criminal process. 424 U.S. at 430. In *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979), this Court stated that *Imbler* prosecuted a prosecutor even if he deliberately withheld exculpatory information. The plaintiff in *Henzel* also alleged that the defendants were engaged in a conspiracy to deprive him of his constitutional rights, in violation of 42 U.S.C. § 1985. *Id.* at 659. While this Court did not suggest that allegations of conspiracy among prosecutors to withhold exculpatory evidence would fall outside the scope of prosecutorial immunity, *Henzel* held instead that the plaintiff's allegations of conspiracy were bare and that he had failed to

allege facts showing the existence of a conspiracy. The district court's grant of summary judgment was affirmed.

Bernard misreads *Thomas v. Harris County*, 784 F.2d 648 (5th Cir. 1986), for the proposition that a conspiracy will prevent a prosecutor from having absolute prosecutorial immunity. In *Thomas*, this court stated that "absent any conspiracy, [the district attorney] is absolutely immune from § 1983 liability for any actions he carried out in his role as prosecutor." *Id.* at 652, citing *Imbler v. Pachtman*. Nowhere does *Imbler* suggest that allegations of conspiracy will defeat prosecutorial immunity, and in fact, the plaintiff in *Imbler* did allege a conspiracy. *Imbler*, 424 U.S. at 415-16. Under *Imbler* and *Henzel*, it appears that the conspiracy allegations which Bernard has made against the Assistant District Attorneys are within the scope of prosecutorial immunity.

B. Dismissal of all defendants in their official capacities.

Bernard argues that there are genuine factual disputes as to whether District Attorney Connick had a custom or policy of inadequate training which reflects deliberate indifference to the rights of individuals and whether his injury was the result of inadequate training. Bernard alleged that

> it is and has been the policy of the defendant, Harry Connick to neglect or refuse to supervise, discipline or in any way control defendants, assistant district attorneys, in their exercise of their functions in their failure to enforce the laws of the State of Louisiana and the United States and is evidence of a callous disregard of

> the rights of the public, including that of the plaintiff and exhibits a lack of that degree of due care which a prudent and reasonable individual would show in exercising his duties as Orleans Parish District Attorney. The defendant has exhibited a policy of reckless disregard of human life.

By these allegations, Bernard seeks to impose liability on the defendants in their official capacities.

Official capacity suits are essentially just another way to plead an action against the governmental entity of which the defendant government official is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Therefore, this suit filed against defendants in their official capacities is to be treated as a suit against the Orleans Parish District Attorney's Office, since the Office did receive notice and did respond.

Liability under 42 U.S.C. § 1983 may not be imposed on a government entity on a theory of respondeat superior for the actions of government employees. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, a government entity is responsible under § 1983 only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," causes an injury. *Id.* at 694.

A plaintiff can establish the existence of an official policy in several ways. He can prove the existence of an official policy that in and of itself violates constitutional rights. *Monell*, 436 U.S. at 694-95; *Oklahoma City v. Tuttle*, 471 U.S. 808, 822, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). He

can also prove the existence of a policy that is not unconstitutional on its face, but reflects a deliberate or conscious choice by the governmental entity to adopt a policy which evidences a "deliberate indifference" to constitutional rights. *Oklahoma City v. Tuttle*, 471 U.S. at 823-24; *Canton v. Harris*, 489 U.S. 378, 388-89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Third, he can prove the existence of a "custom or usage" of depriving persons of their constitutional rights, which practice has become so permanent and well settled that it can be said to represent municipal policy. *Monell*, 436 U.S. at 690-91; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162-69, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (en banc), *cert denied*, 472 U.S. 1016 (1985).

The district court construed Bernard's pleading as having raised all three "policy" claims. The court decided first, however, that Bernard had presented no evidence whatsoever of an overtly unconstitutional policy, so summary judgment was appropriate. In reviewing a grant of summary judgment, an appellate court uses the same standard used by the district court. The evidence, including affidavits, depositions, answers to interrogatories, and admissions on file, when considered in the light most favorable to the non-movant, must demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Dorsett v. Board of Trustees*, 940 F.2d 121, 123-(5th Cir. 1991). The opposing party cannot establish a genuine issue of material fact by resting on the mere allegations of the pleading. A properly supported motion for summary judgment should be granted unless the opposing party produces

sufficient evidence to demonstrate that a genuine factual issue exists. *Id.*

A review of the record reveals that the district court was correct in finding that no genuine issue of material fact existed on this issue. In Connick's deposition testimony and testimony and affidavits of his assistants, all had attested to the fact that it was the policy of the District Attorney's Office to turn over all exculpatory material in compliance with *Brady*. Bernard did not counter with any evidence whatsoever, but merely relied upon his allegations.

Bernard next alleged that Connick had a policy of failure to train his assistants to enforce the laws of the United States and that this evidenced a callous disregard of the rights of the public and exhibited a lack of due care and reckless disregard.

In *Canton v. Harris,* the Supreme Court delineated the circumstances under which "inadequate training [can] be found to be a 'policy' that is actionable under § 1983." 489 U.S. at 383. The first inquiry is "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.* at 385. The plaintiff in *Canton* alleged that the city failed to adequately train its police officers to recognize when medical treatment was required by its detainees. The Court found that the city's policy for medical treatment was constitutional on its face. *Id.* at 386. It held

> Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly

> thought of as city 'policy or custom' that is actionable under § 1983 . . . Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality – a "policy" as defined by our prior cases – can a city be liable for such a failure under § 1983.

Id. at 389. A city can be said to have been deliberately indifferent if, in the light of the duties assigned to the employees, the need for more or different training is obvious and the inadequacy likely to result in the violation of constitutional rights. The plaintiff must also prove that the deficiency in the training program actually caused the injury. *Id.* at 390-91.

The court found that defendants' evidence that all of the assistants had graduated from accredited law schools, had passed the Louisiana State Bar exam, and that *Brady* was an important concern to the office remained uncontroverted by any evidence presented by Bernard. The court also considered the possibility that prior incidents of *Brady* violations might have made the need for further training obvious. Bernard had cited thirteen cases where *Brady* violations occurred over the past fifteen years (given the thousands handled by the Orleans Parish District Attorney's office during that time) was not enough to make the need for training obvious.

We agree that there was no genuine issue of material fact as to the existence of a policy of inadequate training. Although some evidence suggests that the District Attorney's office did not conduct optional training when Connick first took office in 1974, and some of the attorneys may not have been as attuned to *Brady* as they should be,

the evidence is a far cry from suggesting deliberate indifference within the District Attorney's office to training and *Brady* issues. Connick testified that the relief on the experience of the people who had worked for the former district attorney and of several ex-assistant U.S. Attorneys that he hired. He relied on his assistants' integrity and professionalism in making decisions about what materials a defendant was entitled to receive. Connick testified that he expects his attorneys to comply with discovery requirements and would fire any assistant who intentionally withheld exculpatory material to which the defendant was entitled. His assistants attested to the fact that it was the policy of the office to comply with *Brady*. The evidence supporting an issue of inadequate training, raised by Bernard, is simply not enough to support the more onerous issue of a policy of deliberate indifference toward the training of Assistant District Attorneys.

Finally, although Bernard did not specifically allege an unwritten "custom or usage" in his Complaint, he argued, in opposing summary judgment, that such a custom existed. He relied on the thirteen reported cases showing *Brady* violations to show a widespread practice so permanent and well settled that it constituted a custom or usage. The court found that proof of thirteen cases of misconduct over fifteen years was wholly inadequate to raise a fact question as to the existence of such a custom. The court's conclusion is correct. Such a paucity of examples is insufficient to establish a custom. We affirm summary judgment for defendants in their official capacities.[3]

---

[3] Defendants argued below that they were entitled to Eleventh Amendment immunity in their official capacities as state

C. Connick in his individual capacity.

The district court dismissed Bernard's claim against Connick in his individual capacity on the basis of absolute prosecutorial immunity. Although *Imbler* held that a prosecutor is immune from civil suit under § 1983 in initiating and presenting the State's case, the Court did not consider whether the reasons which supported immunity for a prosecutor's role as an advocate also supported immunity for those aspects of the prosecutor's responsibility as an administrator or investigative officer. 424 U.S. at 430-31. The Supreme Court recently held in *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1939-45, 114 L.Ed.2d 547 (1991), that while a prosecutor enjoys absolute immunity for his participation in a probable cause hearing, he is not entitled to absolute immunity for giving legal advice to the police.

Bernard alleged that Connick failed to properly train the assistants and actually instructed them not to turn over *Brady* material. Although we do not resolve the question, it would appear that the actions complained of

---

officials. The district court rejected that claim based on *Mairena v. Foti*, 816 F.2d 1061, 1064 n. 1 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), citing *Crane v. Texas*, 766 F.2d 193, 194-95 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985). These cases held that district attorneys in Louisiana and Texas were not entitled to Eleventh Amendment immunity because they were actually local and not state officials. Defendants argue that more recent Louisiana case law supports their immunity as state officials. In any event, because Bernard failed to defeat defendants' summary judgment motion based on official policy, we need not reach this issue.

do not fall within the District Attorney's role as prosecutor, but as administrator of his office. If so, it is likely that the district court was incorrect in dismissing the suit against Connick individually on the basis of *Imbler*.

Reluctantly, therefore, we must remand solely for the court to explore further the possible liability of Connick individually for failure to train Assistant District Attorneys. It is likely that this question is amendable to summary judgment based on the record developed for the official capacity suit, but because the district court dismissed the individual defendants, Bernard had no opportunity to respond to a summary judgment motion on individual liability. It is also possible that Connick, while not necessarily entitled to absolute immunity, will find a defense of qualified immunity available. *Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983).

CONCLUSION

For these reasons, the judgment of the district court is **AFFIRMED** with respect to all defendants sued in their official capacities and the former Assistant District Attorneys sued in their individual capacities, but it is **REVERSED** and **REMANDED** with respect to District Attorney Connick's liability in his individual capacity.

Filed: 10/06/92
Date of Entry: 10/06/92
Loretta G. Whyte, Clerk

MINUTE ENTRY
BEER, J.
September 28, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ERROL BERNARD	**CIVIL ACTION**
VERSUS	**NO. 89-4916**
HARRY CONNICK, ET AL	**SECTION M**

The Court heard defendant's Motion to Dismiss or alternatively for Summary Judgment on September 16, 1992. For the following reasons, defendant's motion is granted.

I. BACKGROUND

On April 18, 1975, plaintiff Bernard shot and killed Vernon Joseph in New Orleans. After several eyewitnesses identified the plaintiff as the man who shot Joseph, he was arrested and indicted. Plaintiff then was convicted of second degree murder and sentenced to life imprisonment. In 1988, the plaintiff was granted a new trial on the grounds that the state had failed to disclose a police report containing exculpatory evidence to which plaintiff was entitled under *Brady*. Plaintiff then entered an *Alford* plea of guilty to the charge of manslaughter, was sentenced to 21 years, and was released for time served.

In 1989, plaintiff filed a 1983 action against District Attorney Harry Connick and four former Assistant District Attorneys in both their official and individual capacities for violating his rights under *Brady*. In April of 1991, this court dismissed all defendants in their individual capacities based on prosecutorial immunity, and in their official capacities based on the lack of a custom or policy in the office to withhold *Brady* information. Subsequently, in January of this year, the Fifth Circuit affirmed this ruling as to all defendants in their official capacities and as to the Assistant District Attorneys in their individual capacities, but remanded the case as to Defendant Connick in his individual capacity. Defendant Connick herein has filed a Motion to Dismiss and alternatively for Summary Judgment.

II. LAW AND ANALYSIS

On appeal of this matter, the Fifth Circuit remanded the case "solely for the court to explore further the possible liability of Connick individually for failure to train Assistant District Attorneys." The defendant concedes in the briefs that the training of assistants constitutes an administrative rather than a prosecutorial function, and that defendant is not entitled to absolute immunity as to that allegation. Because the training of assistants does fall outside of the prosecutor's quasi-judicial role, absolute immunity does not apply. *Marrero v. City of Hialeah*, 625 F.2d 499, 510 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353 (1981).

Defendant is entitled to qualified immunity in the performance of discretionary functions, like the training

of assistants. *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 2738 (1982). Qualified immunity shields officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The Supreme Court first recognized the right of a criminal defendant to all exculpatory material in the possession of the prosecution in *Brady v. Maryland*, 383 U.S. 83, 83 S.Ct. 1194 (1963). However, in 1975 and 1976, when this incident occurred, the *Brady* doctrine was not yet fully developed, and a reasonable prosecutor might well have been unaware of the boundaries of the defendant's right. Given the uncertainty surrounding *Brady* at the time of the alleged violation, the court finds that defendant is protected by qualified immunity in this case.

Based on the undisputed material facts presented, defendant would also be entitled to judgment as a matter of law on the failure to train allegation. "[T]he inadequacy of [employee] training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton v. Harris*, 109 S.Ct. 1197, 1204 (1989). As discussed in the court's original minute entry on this issue, plaintiff has offered no evidence to even suggest that defendant's failure to adequately train assistants was a matter of "deliberate indifference" to plaintiff's constitutional rights. No factual issue has been presented which would warrant sending this issue to the jury.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that defendant's motion is GRANTED.

Counsel for defendant is requested to submit a judgment consistent with this minute entry.

/s/ Peter Beer
United States District Judge